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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS HERNANDEZ,

Defendant and Appellant.

F061356

(Super. Ct. No. VCF228291)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Gerald F. Sevier, Judge.

Karissa Adame and David L. Kelly, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and John A. Bachman, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Poochigian, J., and Detjen, J.

Jose Luis Hernandez appeals from the judgment entered on a jury verdict finding him guilty of five of seven charged counts: kidnapping to commit robbery (Pen. Code, § 209, subd. (b)(1)),¹ kidnapping (§ 207, subd. (a)), robbery (§ 211), attempted criminal threats (§§ 664/422), and misdemeanor spousal battery (§ 243, subd. (e)(1)). The court sentenced him to life with the possibility of parole for kidnapping to commit robbery, a one-year concurrent term for attempted criminal threats, and 90 days for the battery offense, with credit for time served. The court stayed, pursuant to section 654, the terms imposed for the kidnapping and robbery counts.

On appeal, Hernandez contends his conviction for kidnapping to commit robbery is not supported by substantial evidence. We affirm.

FACTS and PROCEDURAL HISTORY

Hernandez and the victim, TLP, had been married 10 years and had two sons. They separated in June 2009. TLP had a restraining order against Hernandez and was living at a cousin's house with her sons and six others. On October 11, 2009, at approximately 4:00 a.m., she awoke to a knock on her bedroom door that led to the carport and backyard. She had been sleeping in her clothing but put on her shoes and a cap before getting her cell phone and answering the door. Hernandez was at the door. When she told him she would call the police, Hernandez grabbed her cell phone. She asked him to return the phone. At that point, he forced her out of the house, through a break in the backyard fence, across a dry canal, and into a freshly plowed field. He slapped her, told her he would kill her, and placed his hand over her nose and mouth when she screamed. He threw her to the ground, ripped her blouse and bra, pulled down her pants, and sexually assaulted her. As he tore and took her clothing he said, “so that your male cousins can see you.” He covered her nose and mouth until she passed out.

¹ Further statutory references are to the Penal Code.

When she regained consciousness, her pants were missing—along with her cell phone and \$200 she had in her pocket—and she saw Hernandez walking away at a distance carrying her pants. TLP did not usually carry such a large sum of money but was holding the money for a “tanda pyramid” with her cousins and a neighbor. TLP returned to the house, dressed, and reported the incident to a housemate, who called the police.

Tulare County Sheriff’s Deputy Albert Brockman arrived at the house about 5:00 a.m. TLP had dirt in her hair and on her face and was shaking and crying. Officer Brockman found shoe impressions in the backyard dirt leading to the opening in the fence. One set of prints was “pretty solidly in,” the other set seemed to have the toes dragging. The prints matched Hernandez’s and TLP’s shoes. About 50 yards away, he found a cap and a hoop earring, which TLP identified as items she had been wearing. He followed the shoe prints another 15 yards to an area where it appeared a struggle had occurred. There were claw marks in the dirt. Brockman then followed a single set of footprints that lead away from the area and found a pair of women’s underwear about 20 feet away.

Tulare County Sheriff’s detective Ronna Martin took TLP’s statement at the house. TLP said she was dizzy and had trouble remembering details because she had lost consciousness earlier that morning.

While officers were looking for Hernandez, Hernandez called TLP’s sister and asked her to tell TLP to call him on her cell phone, which he had. TLP did so and arranged to meet him at his sister’s house to retrieve her phone, pants, and money. Hernandez told her not to call the police and to come alone.

Officers contacted Hernandez at his sister’s house. Hernandez told them he had put the cell phone into the toilet. However, neither the officer nor Hernandez could find it when they tried to retrieve it. Hernandez looked “confused when it wasn’t there.” Officers searched for TLP’s pants and money but were unable to find either.

Hernandez agreed to speak with the officers and told them that he and TLP were having “troubles.” He knew she had a restraining order against him but he watched the house that night from a nearby field to see when she came home. About 4:00 or 4:30 a.m., he saw her get out of a white truck on the other side of the field. She saw him in the field and walked over to him. They argued. She reminded him of the restraining order and she took out her cell phone. Hernandez grabbed the phone. As they struggled over the phone, TLP fell. He left with the phone. He denied taking her clothing and, when asked about the money, said he did not know what the officer was talking about.

The shoe prints at the scene matched TLP’s version of the event; they did not match Hernandez’s version.

Defense Evidence

In his defense, Hernandez presented photos of the canal and surrounding area where the offenses occurred, and testimony of Officer Brockman that TLP had reported that Hernandez had placed his hands over her mouth and attempted to suffocate her as he pulled her from the room. In argument to the jury, defense counsel noted that TLP’s testimony “was all over the place.” She was not credible. And, the prosecution had not established that Hernandez intended to commit any crime when he came to her door. Defense counsel urged the jury to find him not guilty of everything but battery and theft of the cell phone.

DISCUSSION

Hernandez contends there is no substantial evidence to show he intended to rob TLP when the kidnapping began. We disagree.

When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable,

credible, and of solid value—from which a reasonable jury could find the defendant guilty beyond a reasonable doubt. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1322.)

Kidnapping for robbery requires the defendant to have the specific intent to commit a robbery when the kidnapping begins. (*People v. Davis* (2005) 36 Cal.4th 510, 565-566.) If the intent to rob is formed after the kidnapping begins, the defendant is not guilty of kidnapping for robbery. (*People v. Curry* (2007) 158 Cal.App.4th 766, 779.) However, a kidnapping to effect a robber's escape that involves movement that substantially increases the risk of harm to the kidnapped individual, constitutes the crime of kidnapping for robbery. (*People v. Laursen* (1972) 8 Cal.3d 192, 199-200 (*Laursen*).)

Hernandez concedes the evidence shows that he took TLP's cell phone, underwear, pants, and the money she had in a pocket. He argues, however, there is no evidence from which a reasonable juror could infer that he specifically intended to rob TLP when he forced her from her bedroom and into the field. First, there was evidence he took the cell phone before he moved TLP so he could not have formed the intent to kidnap her to rob her of an item he already had in his possession. Second, clothing is not the type of item a man generally robs a woman of. Thus, the only reasonable inference is that he took the clothing as an afterthought. And, third, there was no evidence that he was aware TLP had money in her pants pocket so he could not have formed the intent to take it when he forced her from her room. He cites in his reply brief cases where the court found insufficient evidence to support the kidnapping for robbery conviction. Although the victim of kidnapping in each case had been robbed, there was direct evidence that another criminal intent motivated the kidnapping: *People v. Bailey* (1974) 38 Cal.App.3d 693,699 [escape from a penal institution]; *People v. Tribble* (1971) 4 Cal.3d 826, 831-832 [sexual assault]; *People v. Shelburne* (1980) 104 Cal.App.3d 737,742-743 [to secure possession of victim's motorcycle as collateral for a loan]; and *In re Alvarado* (1972) 27 Cal.App.3d 610, 613-614 [rape].

The People respond there is substantial evidence that Hernandez forcibly moved TLP away from the house and into the field to make his escape after taking her cell phone. Thus, there is sufficient evidence under the holding of *Laursen, supra*, 8 Cal.3d 192 to support Hernandez's conviction for kidnapping for robbery. In *Laursen*, defendant and another robbed a market and, when their car failed to start, ordered at gunpoint a man parked nearby to drive them to a place of safety. After a harrowing drive, the man was eventually tied up in an orchard and a robber drove off in the car. (*Id.* at pp. 196-197.) The court held that where a kidnapping occurs after a robbery has commenced,² the kidnapping may be kidnapping for the purpose of robbery if it can reasonably be inferred that the transportation of the victim was to effect the escape of the robber or to move the victim to another place where the victim might less easily sound the alarm. (*Id.* at p. 200; *People v. Monk* (1961) 56 Cal.2d 288, 295.)

In Hernandez's reply brief, he retreats from his first argument and asserts the evidence was conflicting as to when Hernandez took the cell phone: at the bedroom doorway or in the field. He adds, however, there is no substantial evidence he intended to permanently deprive TLP of the phone. Hernandez essentially argues the jury should not have inferred that he intended to rob her of her property when he pulled her from the room into the field because there is no direct evidence of his intent when he initially accosted her.

When there is no direct evidence of intent underlying an offense, the intent must be inferred from the circumstances of the offense. (See e.g., *People v. Holt* (1997) 15 Cal.4th 619, 669.) In this case, while there is no direct evidence of Hernandez's motive in forcing TLP from her bedroom to the field, reasonable jurors could have inferred

² Defendant was not charged with robbing the driver of his vehicle. The market robbery was the only subject of the conviction under section 209. (*Id.* at p. 198.)

Hernandez forcibly moved TLP away from the house, where others were present who might have helped her, to do precisely what he did do in the field: assault, batter and rob TLP of the property she had with her. Further, reasonable jurors also could have inferred that Hernandez intended to permanently deprive TLP of her pants, cell phone, and the money in her pocket because those items were never recovered. In the alternative, reasonable jurors could have inferred that Hernandez kidnapped TLP after taking her cell phone at the bedroom door in order to escape to a place of temporary safety away from the house, where TLP might have summoned others to come to her aid. Under either scenario, the record discloses substantial evidence to support the kidnapping for robbery conviction.

Hernandez in effect is asking this court to reweigh the evidence and reach a conclusion contrary to that reached by the jury. An appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because the circumstances might also support a contrary finding. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) Here, although there is no direct evidence of Hernandez's intent to rob TLP when he kidnapped her, the jurors could reasonably infer that intent from the circumstances that ensued.

DISPOSITION

The judgment is affirmed.